trunks, that do not involve collocation.[57] These same methods could also permit a carrier to access the unbundled network element of an ILEC, in essence using the trunks as some sort of super cross-connect.[58] Thus, if, indeed, the inquiry was simply whether collocation is "required" or "indispensable" to interconnect or to access a UNE from the standpoint of network architecture, the answer in many cases arguably might be "no."[59] But the inquiry is not so limited because the statutory purposes of the 1996 Act are not so narrow. The structure of the Act makes clear – and four years of experience has shown – that collocation under 251(c)(6) is a means of implementing interconnection under 251(c)(2) and access to UNEs under 251(c)(3). Any interpretation of the Act must proceed accordingly or there would be little substance to Section 251(c)(6) and the pro-competitive provisions of Section 251 would be undermined.

The purpose of Section 251(c)(6), to further the statutory objectives of Sections 251(c)(2) and 251(c)(3), has previously been recognized by the Commission. As the Commission stated in the *Local Competition First Report and Order*: "both the interconnection and unbundling sections of the Act, *in combination with the collocation obligations imposed by Section 251(c)(6)*, allow competing carriers to choose technically feasible methods of achieving interconnection or access to unbundled network elements."[60] More pointedly, the Commission "conclude[d] that, under Sections 251(c)(2) and 251(c)(3), any requesting carrier may choose *any* method of technically feasible interconnection or access to unbundled elements at a

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57 *Id.* at 15779-82; *see also Bell-Atlantic New York Application for Section 271 Authority*, 15 FCC Rcd 3979, ¶ 66 (1999) (technically feasible networks of interconnection include interconnection trunking, meet point arrangements, and collocation).

58 *Local Competition First Report and Order*, 11 FCC Rcd at 15719-15720, ¶ 444.

59 *See infra* note 73 and accompanying text.

60 11 FCC Rcd at 15588, ¶ 172 (emphasis added).

particular point."[61] In other words, if the objectives of these two sections are to be met, Section 251(c)(6) cannot be interpreted in the strictest sense within the vacuum of only its own terms. Rather, Section 251(c)(6) must be read in the context of Section 251(c) as a whole and to support its pro-competitive goals.

The subservience of Section 251(c)(6) to the objectives of Sections 251(c)(2) and 251(c)(3) is further illustrated by the competitive checklist in Section 271 of the Act of items that Bell operating companies must meet before they are permitted to provide in-region interLATA service. Under the checklist, Bell operating companies are required to provide interconnection and access in accordance with Sections 251(c)(2) and 251(c)(3) of the Act, but the checklist is silent as to any requirement to provide physical collocation.[62] The reason for this is that the Section 251(c)(6) obligation to provide physical and virtual collocation supports and furthers the objectives of Sections 251(c)(2) and 251(c)(3).[63]

2. SECTION 251(C)(6) WAS REQUIRED IN ADDITION TO SECTIONS 251(C)(2) AND 251(C)(3) TO ENSURE THE COMMISSION HAD THE REQUISITE AUTHORITY TO ORDER COLLOCATION

If physical and virtual collocation are only two types out of a greater number of methods of interconnection and access to UNEs of those contemplated by Sections 251(c)(2) and 251(c)(3), a strict interpretation of "necessary" would raise the issue of why Section 251(c)(6)

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61 11 FCC Rcd at 15779, ¶ 549.

62 *See* 47 U.S.C. § 271(c)(2)(B).

63 For example, the Commission when approving the Bell Atlantic New York request for Section 271 Authority stated that "[t]he provision of collocation is an essential prerequisite to demonstrating compliance with item 1 [interconnection under Section 2451(c)(2)] of the competitive checklist." *Bell Atlantic New York Application for Section 271 Authority* 15 FCC Rcd 3979, ¶ 66, (1999). *See also BellSouth (Louisiana) Application for Section 271 Authority*, 15 FCC Rcd 4035, ¶163 (1998)(absence of definite terms and conditions for collocation caused BellSouth to fail item 2 [access to UNEs under Section 251(c)(3)] of the checklist).

was required at all? The answer is straightforward and further illustrates why a narrow reading would be innappropriate. As the Commission recognized in its *Local Competition First Report and Order*, before the 1996 Act, its attempts to require ILECs to offer physical collocation foundered because the Act did not give the Commission specific statutory authority necessary to order what the D.C. Circuit thought would likely be a taking of ILEC property.[64] The Commission found in that *Order* that the question of such authority "largely evaporates" in the context of the 1996 Act, and Section 251(c)(6) in particular.[65] The D.C. Circuit in *GTE v. FCC* agreed.[66] The objective of Section 251(c)(6) is not simply to provide for physical or virtual collocation *per se* when no other method of collocation is available, however, but to promote competition by allowing for collocation that furthers the larger statutory purpose that requesting carriers be able to choose from among the various technically feasible methods of interconnection and access to UNEs.[67]

Stated otherwise, the structure of Section 251 taken as whole inevitably leads to the following conclusions: one, Congress intended that the ILECs permit interconnection and provide access to unbundled network elements; two, Congress, preserving the rulemaking authority of the Commission under Section 201(b), intended the Commission as an expert agency adopt rules and regulation consistent with the Act "as may be necessary in the public interest to

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64 *Local Competition First Report and Order* 11 FCC at 15809 ¶ 613, 15810-11 ¶ 615 (citing *Bell Atlantic v. FCC*, 24 F. 3d 1441 (D.C. Cir. 1994)).

65 *Id.* at 15811, ¶ 616.

66 205 F. 3d at 419-20.

67 *Local Competition First Report and Order*, 11 FCC Rcd at 15779, ¶ 550 (CLECs must be able to choose *any* method of interconnection or access to UNE).

carry out the provisions of [the] Act," including Section 251(c);[68] three, Section 251(c)(6) is intended to further Sections 251(c)(2) interconnection and Section 251(c)(3) unbundling;[69] and four, that absent the need for express statutory authority for physical collocation identified in *Bell Atlantic v. FCC*, Section 251(c)(6) would be mere surplusage relative to Sections 251(c)(2) and 251(c)(3).

In this context, Section 251(c)(6) therefore authorizes the Commission to order physical collocation that the Commission deems necessary to fulfill the requirements of Sections 251(c)(2), interconnection, and 251(c)(3), access to network elements. The inescapable implication of the Commission's reading of the *Bell Atlantic v. FCC* decision is that, without Section 251(c)(6) or similar express statutory authority, it would not be possible for the Commission to impose physical collocation rules and regulations as necessary to ensure that ILECs meet their interconnection and unbundling obligations under Sections 251(c)(2) and (c)(3) of the Act and the pro-competitive purposes of these section.[70] Properly seen, therefore, because collocation is a method both of interconnection and of access to UNEs, Section 251(c)(6) is necessary to ensure that the goals and objectives of Sections 251(c)(2) and 251(c)(3) could be achieved. Concomitantly, Section 251(c)(6), in general, and the term "necessary," in particular,

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68 47 U.S.C. § 201(b). *See also* 47 U.S.C. § 251(i)(Commission's authority under Section 201 preserved). In *AT&T Corp. v. Iowa Utilities Board*, the U.S. Supreme Court recognized that Section 201(b) gave the Commission the authority to adopt rules and regulations to implement the provisions of Sections 251 and 252 of the Act. 525 U.S. at 377-85. That authority extends to the authority to adopt regulations implementing Section 251(c)(6), as well as Sections 251(c)(2) and 251(c)(3) and the pricing provisions of the Act.

69 As the Commission recognized in the *Local Competition First Report and Order and Advanced Services First Report and Order*, collocation is a primary method by which CLECs achieve interconnection and access to unbundled network elements. *See also* 47 C.F.R. §51.321(b).

should be interpreted, in conjunction with the Commission's general rulemaking authority in Section 201(b), as empowering the Commission to require ILECs to permit physical collocation as the Commission deems necessary to achieve the goals of the Act. Accordingly, the Commission should define the provision "physical collocation of equipment necessary for interconnection or access to unbundled network elements" to mean collocation of equipment needed to fulfill the requirements of the sections that define interconnection and access to network elements, Sections 251(c)(2) and (c)(3), respectively.[71] In short, in addition to the more general provisions of Sections (c)(2) and (c)(3) which are sufficient for the Commission to order that non-collocation methods be made available, Section 251(c)(6) is required if collocation is to be among the choices that a CLEC has to interconnect or obtain access to UNEs.

3. THE INTERPRETATION URGED BY THE JOINT COMMENTERS IS CONSISTENT WITH THE D.C. CIRCUIT'S INSTRUCTIONS THAT SOME LIMITING STANDARDS BE APPLIED

Significantly, the interpretation the Joint Commenters urge here takes heed of the D.C. Circuit's admonition that the obligation to allow physical collocation not be unlimited, but related to the statute's purposes.[72] Numerous limitations are inherent in both the interconnection and unbundling provisions of the Act, as well as Section 251(c)(6) itself. First, physical collocation is not an obligation where it is impractical because of space limitations. 47 U.S.C. §251(c)(6). Second, physical collocation is not required where it would be technically infeasible.

(...continued)

70 *See Local Competition First Report and Order* 11 FCC Rcd at 15809, ¶ 613. *See also BA v. FCC*, 24 F. 3d at 1446-47.

71 The centrality of these objectives to Congressional interest is that the FCC may not forbear from enforcing Sections 251(c)(6) – as well as 251(c) in general – until its "requirements have been fully implemented." 47 U.S.C §10(d).

72 *GTE v. FCC,* 205 F. 3d at 424.

47 U.S.C. §§251(c)(2)(6), 251(c)(3) and 251(c)(6). Third, only telecommunications carriers are entitled to collocation. 47 U.S.C. §§251(c)(2), 251(c)(3), and 251(c)(6). Fourth, where the collocation is to be used for interconnection purposes, such interconnection must be for the transmission and routing of local exchange service or exchange access. 47 U.S.C. §251(c)(2)(A). Fifth, where the collocation is being used to access UNEs, such UNEs must be used for the provision of a telecommunications service. 47 U.S.C. §251(c)(3).

The foregoing standards ensure that physical collocation rules, as advocated herein, will be closely related to the statutory purposes of Sections 251(c)(2) and (3), thereby setting limiting parameters on the definition of "necessary" in particular, and the ILEC obligation in Section 251(c)(6) in general, to satisfy the admonitions of the Supreme Court and D.C. Circuit. Any further restrictions would be impermissible under the plain language of the Act and in insoluble tension with the pro-competitive objectives of the Act and Sections 251(c)(2) and 251(c)(3). The Commission should resist any temptation to add further limitations or restrictions on its interpretation of these key market-opening provisions as they are not warranted under the statute.[73]

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[73] If "necessary" is interpreted in some narrow fashion such as "required or indispensable," such that Section 251(c)(6) applies solely to the equipment types that represent the physical minimum that permit interconnection or access to UNEs, section 251(c)(6) would be rendered meaningless. As the FCC found in the *Local Competition First Report and Order*, collocation *per se* is not absolutely required if the reference to "necessary for interconnection or access to unbundled network elements" in Section 251(c)(6) is limited to some bare bones method of interconnection or access; there are alternative methods for providing interconnection and access, *i.e.*, "meet point" interconnection. Thus, if "necessary" modifies the equipment without which a CLEC could not obtain interconnection or access, as opposed to physical collocation required to meet ILEC obligations imposed by sections 251(c)(2) and (c)(3), than arguably in my circumstances *no* equipment would meet the requirements of section 251(c)(6). As a result, one would be led to the absurd conclusion that collocation for interconnection and access to UNEs is not permitted pursuant to section 251(c)(6) because collocation is not, strictly speaking, indispensable for interconnection or access. If "necessary" were read in this strictest sense, then the obligations of an ILEC to provide for collocation might be (continued...)

* * *

Four years of CLEC experience with trying to obtain physical collocation underscore that collocation is a vital means of interconnection and access to UNEs if competition is to take hold. The rules of statutory construction require that the Commission give meaning to this provision of the statute consistent with the context and overall purpose of the Act. Because the strict application of the term "necessary" to refer to only that equipment indispensable for interconnection or access to UNEs renders Section 251(c)(6) all but meaningless and will not further these statutory purposes, it would be unreasonable to interpret the term narrowly in the circumstances. Instead, Section 251(c)(6) should be read to authorize physical collocation that the Commission deems required to fulfill the goals of Section 251(c), including the collocation of any equipment without which the Commission concludes that the ILECs cannot satisfy their obligations under Sections 251(c)(2) and (c)(3) and the pro-competitive objectives of the Act cannot be achieved. What that means is discussed more fully below.

C. REQUESTING CARRIERS MUST BE PERMITTED TO COLLOCATE ANY EQUIPMENT THAT THEY INTEND TO USE FOR INTERCONNECTION OR ACCESS TO UNES AND TO TTILIZE ALL FUNCTIONS RELATED TO THESE OPERATIONS

As explained above, ILECs must provide physical collocation to the extent the Commission deems required to further the goals and objectives of Sections 251(c)(2) and 251(c)(3). Previously, in the *Local Competition First Report and Order* and the *Advanced Services First Report and Order*, the Commission required ILECs under Section 251(c)(6) to permit physical collocation of the following types of equipment:

(...continued)
little more than those applying to all carriers under Section 251(a) – *i.e.*, collocation would be strictly voluntary -- and Section 251(c)(6) would impermissibly be rendered
(continued...)

- Transmission equipment, including optical terminating equipment, concentration equipment, and multiplexers.[74]

- DSLAMs, routers, ATM multiplexers, remote switching modules and other equipment used to interconnect with an ILEC or to access unbundled network elements for the provision of telecommunication services.[75]

Provided that such collocated equipment is used for such interconnection or access, the *Advanced Services First Report and Order* permitted the collocating carriers to use other functions integrated into such equipment, including switching and enhanced services functionality.[76]

There has been no debate from the ILECs that they must accommodate physical collocation of basic transmission equipment of the sort described in the first bullet above. Indeed, collocation of this type of equipment was expressly required in the *Local Competition First Report and Order,* and the ILECs did not appeal that finding.[77]

The debate revolves around integrated and multifunction equipment that not only provides for direct access to UNEs and/or interconnection, but has other related functionality as well. The regulatory treatment of such equipment is particularly important for the development of competition because modern technology is eradicating the need for separate transmission, multiplexing, switching, and information services equipment, to name a few examples. The Commission has already recognized that equipment integrating multiple functions is more

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(...continued)
meaningless. *See Moskal v. US*, 498 U.S. 103, 109-110 (1990) (there is an interpretive obligation to try to give meaning to all the statutory language).

74 *Local Competition First Report and Order* 11 FCC Rcd at 15794, ¶580.

75 *Advanced Service First Report and Order* 14 FCC Rcd at 4776-4777 ¶28.

76 *Id.* at 4777-4778 ¶29.

77 *See Local Competition First Report and Order*, 11 FCC Rcd at 15799, ¶ 580.

efficient and cost effective. Such equipment also facilitates the provision of a broader range of services.[78]

The Joint Commenters submit that provided the equipment a CLEC seeks to collocate is deployed for purposes of access to UNEs and/or interconnection and meets minimum threshold requirements, such as NEBS Level 1 safety standards,[79] the burden should be on the ILEC to demonstrate that collocation of such equipment should not be allowed. To succeed, ILECs must show that the requested collocation is not technically feasible, is impractical because of space limitations, or violates other bases expressly in the Commission's rules, namely that the collocation of such equipment is not required to "fully implement" the provisions and objectives of Sections 251(c)(2) and 251(c)(3).

Unless such equipment as described above, and equipment that provides similar functionality, is permitted under the rules the Commission adopts in this proceeding, the goals and objectives of Sections 251(c)(2) and 251(c)(3) will be frustrated for several reasons:

First, CLECs will not be able to compete effectively with ILECs because they will either be unable to provide the same services as the ILEC in all cases or the cost of providing services will increase unreasonably, giving ILECs an insurmountable and discriminatory competitive edge. For example, as the Commission recognizes, in order to provide xDSL services, a carrier's DSLAM cannot be located beyond a certain distance from the end user and the equipment must have direct access to the copper loop.[80] In most instances, this

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78 *See Advanced Services First Report and Order*, 14 FCC Rcd at 4775, 4777-4778, ¶¶ 26, 29.

79 *Id.* at 4780-81, ¶¶ 34-35.

80 *See UNE Remand Order*, at 15 FCC Rcd at 3838-3839, ¶313 ("xDSL services generally may not be provisioned over fiber facilities. . . . We agree that if a requesting carrier is unable to install its DSLAM at the remote terminal or obtain spare copper loops (continued...)

will require collocation or the CLEC will have to construct its own loop facilities, a requirement Section 251(c)(3) was meant to obviate (subject to the necessary and impair standards of Section 251(d)). Thus, in order to use interconnection or access to UNEs, to compete with ILECs, collocation of certain equipment must be permitted in the ILEC premises.[81]

Notably, the "additional" functionalities being described herein are those the CLEC would have no reason to utilize if the equipment were not also being used for interconnection with the ILEC network or access to UNEs. Thus, for example, integrated switching functionality will act on traffic that is exchanged with the ILEC network (interconnection) or over unbundled loops and/or transport (access to UNEs). Accordingly, such functions in addition to basic transmission functions are, in any reasonable sense of the words, used for interconnection or access to UNEs and their deployment is inextricably related to the purposes of Sections 251(c)(2) and 251(c)(3).[82]

If collocation of modern integrated or multifunction equipment is denied, competitors' costs will increase unnecessarily, denying CLECs a meaningful opportunity to compete. Denying CLECs the ability to collocate such equipment will force CLECs to buy multiple pieces of less efficient, single function equipment, only some of which may be

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(...continued)
necessary to offer the same level of quality for advanced services, the incumbent LEC can effectively deny competitors entry into the packet switching market."). Notably, the decision by the FCC in some circumstances to not make certain advanced service UNEs available, such as packet switching and permanent virtual circuits, was predicated on the ability of CLECs *to collocate* DSLAMs and related multifunction equipment in ILEC premises. *Id.* at 3838-3839, ¶ 313.

81 The need for collocation in the remote terminals of ILECs to provide certain advanced services is discussed more fully below in Section VIII.

82 The D.C. Circuit, in *GTE v. FCC*, referred to "straw man" integrated functionalities such as payroll or data collection unrelated to interconnection or access to UNEs. 205 F. 3d at (continued...)

collocated (under such a narrow interpretation), despite the fact that the functions of the integrated equipment all intricately relate to interconnection or access to UNEs. In addition to the expenditures for additional pieces of equipment, a CLEC's associated land and building costs to achieve the same functionality will increase if it cannot collocate integrated or multi-function equipment but must find space both in and outside of ILEC premises for multiple pieces of equipment. The CLEC will also incur the additional costs of unnecessary transport and cross connections between these multiple pieces of equipment. Further, because of these connections, additional points of failure will be needlessly introduced into CLEC network architectures. As the Commission stated when it rejected efforts by the ILECs to require intermediate single point of termination ("SPOT") frames and other arrangements between unbundled elements and collocated equipment, additional points of failure are unnecessary and introduce inefficiencies into the networks of competitors.[83] Moreover, as the D.C. Circuit recognized in *GTE v. FCC*, economic and operational factors such as these are properly considered when ascertaining whether the Commission's rules further the statutory purposes of the Act.[84]

Second, if ILECs are not required to permit collocation of such multifunction equipment, ILECs will be given an enhanced, if not inherent, ability to discriminate against CLECs in violation of Sections 251(c)(2), 251(c)(3), and 251(c)(6) of the Act. Specifically, ILECs will be capable of discriminating because, unlike CLECs, they will be able to install and use the most efficient technology and equipment to access network elements directly. Section

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(...continued)
424. The Joint Commenters are unaware of any desire of CLECs to have such functionalities integrated into collocated equipment.

83 *See Advanced Service Order* 14 FCC Rcd at 4784-4785 ¶ 42.

84 205 F. 3d at 425.

251(c)(3) prohibits ILECs from providing access to UNEs discriminatorily. The Commission recognizes that the nondiscrimination requirement is met only if the elements *and the access to those elements* that CLECs receive are of the same quality as the elements and access thereto that *the ILEC itself enjoys*:[85]

> [T]he phrase "nondiscriminatory access" in Section 251(c)(3) means at least two things: first the quality of an unbundled network element that an incumbent LEC provides, *as well as the access provided to that element,* must be equal between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an incumbent LEC must be at least equal in quality to that *which the incumbent LEC provides to itself.*[86]

Moreover, as the Commission noted in the *Local Competition First Report and Order*, "because Section 251(c)(3) includes the terms 'just' and 'reasonable,' this duty encompasses more than the obligation to treat carriers equally."[87] Specifically, Section 251(c)(3) requires that the means of access to unbundled elements, as well as the elements provided, must give carriers a "meaningful opportunity to compete" with the ILEC.[88] As noted above, if CLECs, unlike ILECs, are required to incur the additional and unnecessary equipment, space, and transport costs described above – as well as introduce additional points of failure into their networks — in order to interconnect with ILEC, and access UNEs to provide telecommunication services, they will be denied such a meaningful opportunity to compete.

Similarly, the Commission concluded that the term "discriminatory" as used in Section 251(c)(2) "applies to the terms and conditions [of interconnection] that an incumbent

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85 *Local Competition First Report and Order* 11 FCC Rcd at 15657, ¶ 312.

86 *Id.* (emphases added).

87 *Id.* at 15660, ¶ 315.

88 *Id.*

LEC imposes on third parties *as well as on itself*."[89] The Commission also explained that where the interconnection the ILEC provides is "less efficient than an incumbent LEC provides itself, the incumbent LEC violates the duty to be just and reasonable under Section 251(c)(2)(D)."[90] Where a CLEC is limited to collocating equipment on an ILECs premises that is more costly and less efficient that an ILEC itself can place in those premises, then the collocation provided is discriminatory, unjust, and unreasonable and in violation of Section 251(c)(2).

Significantly, Section 251(c)(6), in a manner fully complementary to Sections 251(c)(2) and (c)(3), also includes the obligations that terms and conditions be just, reasonable, and nondiscriminatory. ILECs have no restrictions on the placement of integrated or multi-function equipment on their premises used to access elements in their network or otherwise interconnect such equipment with existing network configurations. Denying CLECs the same flexibility would be unjust, unreasonable, and discriminatory in violation of Section 251(c)(6).

Third, if the types of equipment that can be collocated are defined to exclude those which integrate functions that are not in the strictest "stand alone" sense absolutely required for the physical activities of interconnection and access to UNEs, albeit they are used in conjunction with such activities, ILECs will be able to delay a CLEC's efforts at collocation and its delivery of services to consumers.[91] Specifically, ILECs will have the incentive to challenge, on a regular basis, whether the functionality of the equipment that the CLEC intends to collocate to access UNEs or interconnect with the ILEC network complies with the Commission's rules and regulations. Regardless of where the Commission draws the line between equipment types

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89 *Id.* at 15612, ¶ 218 (emphasis supplied).

90 *Id.*

that CLECs must be allowed to collocate and equipment that CLECs are not entitled to collocate absent ILEC consent, ILECs must not be allowed to be the arbiters of what equipment they are obligated to permit requesting carriers to collocate on their premises. That authority must always reside in a *bona fide* regulatory body which makes such determination *de novo*, guided, of course, by appropriate Commission rules.

In short, to ensure that CLECs are given a meaningful opportunity to compete, the market and efficient network and equipment design – not regulation – should determine where and what types of equipment CLECs may collocate in order to access unbundled network elements and interconnect with ILECs. Only by permitting collocation of the different types of equipment described above will the Commission foster the achievement of the goals and objectives of Sections 251(c)(2) and 251(c)(3), as well as the broader purposes of the 1996 Act. Accordingly, the physical collocation of such equipment is "necessary for interconnection or access to unbundled network elements" under Section 251(c)(6), read in conjunction with Sections 251(c)(2) and 251(c)(3).

IV. THE REQUIREMENTS OF SECTIONS 251(C)(2), (C)(3) AND (C)(6), ALONG WITH THE DECISION OF THE D.C. CIRCUIT, PROVIDE THE COMMISSION WITH SUFFICIENT GUIDANCE TO DETERMINE THE MEANING OF "PHYSICAL COLLOCATION" UNDER SECTION 251(C)(6)

As detailed in Section II, in the *Advanced Services First Report and Order*, the Commission adopted several pro-competitive decisions that facilitated physical collocation in ILEC offices, but were vacated by the D.C. Circuit. First, the Commission required ILECs to allow collocation in any unused space, as long as there were no technical reasons for not

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(...continued)
91 For a fuller discussion of the impact on CLECs and their customers resulting from delays in collocation, see Section VI, A., *infra*.

allowing collocation in the unused space.[92] Second, the Commission determined that ILECs could not require competitors to collocate in separate or isolated areas.[93] Finally, the Commission determined that the ILECs could not require competitors to use separate entrances to obtain access to their equipment.[94] As the Commission noted in the *Second Further Notice*, the court found that the Commission had not adequately justified its decisions and remanded these decisions to the Commission so that it could refine, reconsider, and further explain its requirements.[95]

A. THE D.C. CIRCUIT'S DECISION TO UPHOLD THE COMMISSION'S RULES REQUIRING ILECS TO PROVIDE CAGELESS PHYSICAL COLLOCATION PROVIDES THE FRAMEWORK FOR REAFFIRMING THE COMMISSION'S DECISIONS REGARDING SPACE ASSIGNMENT, ISOLATED AND SEPARATED COLLOCATION AREAS, AND SEPARATE ENTRANCES

As discussed above, the D.C. Circuit affirmed the Commission's decision to require ILECs to provide cageless collocation.[96] The D.C. Circuit's decision provides the framework for deciding how to resolve the remaining issues regarding physical collocation: space assignment, isolated and separated collocated areas, and separate entrances. As discussed above, nothing in the Act expressly requires (or prohibits) cageless collocation.[97] However, as the Commission reasoned and the court approved, caged collocation alone does not fulfill the goals of the Act because it is more expensive and it wastes a precious commodity, space in the

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92 *Advanced Services First report and Order*, 14 FCC Rcd at 4784-85, ¶ 42.

93 *Id.*

94 *Id.*

95 *Second Further Notice* 2000 Lexis at 109-110 ¶ 94.

96 *GTE v. FCC*, 205 F. 3d at 424-425.

97 *Id.* at 425.

ILECs' office.[98] The court rejected the ILECs' argument regarding security concerns with cageless collocation arrangements – which is not mentioned in Section 251(c)(6) and is not one of the two limitations on ILEC provision of physical collocation[99] – finding that there were "alternative means available to LECs to ensure the security of their premises."[100] These findings combined with the other requirements of Section 251(c)(6), and ultimately the requirements of Section 251(c)(2) and (c)(3), as discussed below, dictate that the Commission reaffirm its previous decisions regarding physical collocation and better explain those decisions so that the D.C. Circuit understands why the Commission's initial decisions were correct and required by the Act.

B. THE STATUTORY REQUIREMENTS OF SECTIONS 251(C)(2), (C)(3), AND (C)(6) PROVIDE THE COMMISSION WITH THE AUTHORITY TO ALLOW COMPETITORS TO CHOOSE COLLOCATION SPACE, FORBID SEGREGATED SPACE ABSENT A SHOWING THAT IT IS TECHNICALLY REQUIRED UNDER SECTION 251(C)(6), AND PROHIBIT THE ILECS FROM REQUIRING SEPARATE ENTRANCES

1. THE PLAIN MEANING OF SECTION 251(C)(6) REQUIRES ILECS TO ALLOW PHYSICAL COLLOCATION IN UNUSED SPACE WHERE THERE ARE NO TECHNICAL CONCERNS

ILECs have a "*duty to provide, . . . for physical collocation* of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, *except . . . if* the local exchange carrier demonstrates to the State commission that *physical collocation is not practical for technical reasons or because of space*

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98 *Id.*

99 Section 251(c)(6) requires an ILEC to provide for physical collocation unless it can demonstrate to a State commission "that physical collocation is not practical for technical reasons or because of space limitations." 47 U.S.C. § 251(c)(6). Security, convenience to the ILEC, whether the ILEC is happy, and so forth, are not valid concerns for determining whether an ILEC must provide physical collocation on its premises.

100 *GTE v. FCC*, 205 F. 3d at 425.

limitations."[101] Therefore, if the equipment is necessary to fulfill the goals of Section 251(c)(2) or (c)(3), as described above, the ILEC must allow physical collocation unless it is not practical for technical reasons or because of space limitations. If there is unused space and there are no technical reasons for not using the space, then the ILEC must allow physical collocation in that space. Simply stated, until such space is exhausted in an ILEC office, the ILEC must continue to provide physical collocation in that office.

The issue then, is not when must an ILEC provide physical collocation – if there is unused space and there are no technical concerns about the space it must provide physical collocation – but rather, as recognized by the Commission in *Second Further Notice*,[102] who is to choose what space to use in the ILEC office, and subject to what constraints.[103] In the *Advanced Services First Report and Order*, it appears that the Commission combined the "when" and "who" questions in such a way that the D.C. Circuit did not understand why the Commission reached the conclusions it did. The Commission, however, was within its statutory authority when it implemented a space assignment policy for physical collocation. It just needs to better articulate that policy and explain why it took the actions it did.

2. SECTIONS 251(c)(2), (c)(3), AND (c)(6) REQUIRE THAT A CLEC BE ABLE TO CHOOSE IT OWN COLLOCATION SPACE

Section 251(c)(6) imposes on ILECs the duty to provide for physical collocation "on rates, terms, and conditions that are just reasonable, and nondiscriminatory."[104] Similarly,

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101 47 U.S.C. § 251(c)(6) (emphases added).

102 *Second Further Notice* 2000 Lexis at 110-112 ¶¶ 95-96.

103 *GTE v. FCC*, 205 F. 3d at 426; *Reconsideration Notice* 2000 Lexis 110-111 at ¶ 95.

104 47 U.S.C. § 251(c)(6).

Section 251(c)(2)(C) requires nondiscriminatory interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself, or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection."[105] Further, Section 251(c)(3) requires "nondiscriminatory access to network elements on an unbundled basis."[106] In considering whether provision of interconnection or access to UNEs is discriminatory in the collocation context, the Commission must consider where the ILEC locates its own equipment, as well as where it has permitted its subsidiaries, its affiliates, and other competitors to collocate equipment. Not only is this consistent with previous Commission considerations of the nondiscrimination standard,[107] it fulfills the requirements of Sections 251(c)(2), (c)(3), and (c)(6).

a. Ensuring collocation that is just, reasonable and nondiscriminatory

The best way to ensure that collocation space is offered to competitors in a just reasonable and nondiscriminatory manner is to have competitors choose their own space, just as ILECs do. Any challenge an ILEC might raise in response to a competitor's selection must be subject to clear criteria designed to ensure competitors are not denied space unjustly, unnecessarily, or in a discriminatory manner. If carriers cannot select the space, then there will inevitably be delay, additional cost, and increased litigation, as competitors are required to work their way through the gauntlet of unnecessary steps, poor space assignments, and ILEC challenges to competitors seeking to obtain space they are entitled to by the statute. In such

105 47 U.S.C. § 251(c)(2)(C).

106 47 U.S.C. § 251(c)(3).

107 *Local Competition First Report and Order*, 11 FCC Rcd at 15612, ¶ 218.

circumstances, one cannot maintain that collocation is being provided in a just, reasonable, and nondiscriminatory manner, as required by Sections 251(c)(2), (c)(3), and (c)(6).

b. **Who selects space for the ILECs, it affiliates, and subsidiaries?**

Sections 251(c)(2), (c)(3) and (c)(6), all require the ILECs to provide just, reasonable and nondiscriminatory access to interconnection and access to UNEs. In considering compliance with these requirements the Commission must consider how the ILEC treats itself, as well as how it treats its affiliates and subsidiaries, not just how it treats competitors. The Commission must consider that currently the ILEC chooses where to locate its equipment within its office. Given the mandate of nondiscriminatory collocation, why should an ILEC choose where to locate its competitor's equipment?

What about the ILEC's affiliates and subsidiaries? Who chooses their space? What criteria are used to select that space? The Commission must ensure that the ILECs do not favor their subsidiaries and affiliates, or themselves for that matter, over competitors. Does the ILEC blindly choose where to collocate its affiliate, subsidiaries, and competitors *i.e.,* is the process blind so that the ILEC does not know to which carrier it is assigning collocation space? This is unlikely.

In a competitive market, an ILEC would locate its equipment in an efficient and cost-effective manner. To achieve the nondiscrimination requirements of Sections 251(c)(2), (c)(3), and (c)(6), the ILEC and collocators must all be to locate equipment in the same way.[108]

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[108] The Commission should consider requiring the ILECs to locate their equipment in a cost effective and space efficient manner. By instituting this requirement the Commission can prevent the ILECs from locating their equipment in a manner that occupies more space than is necessary. This requirement would achieve the same goal and complement the Commission's rule requiring the ILECs to remove obsolete unused equipment, *i.e.*, preserving space for collocation. *Advanced Services First Report and Order*, 14 FCC Rcd at ¶ 60; 47 C.F.R. § 51.321(i).

If the Commission or a state commission were assigned to determine where the ILECs placed their equipment, not only would ILECs object, the result would be less efficient placement of equipment. Just as the ILEC should be able to choose where it wants to locate its equipment, competitors should be allowed to choose where to locate their equipment in the central office. Otherwise, collocation will be discriminatory and the competitive market will not be approximated, frustrating the purposes of the Act.

The nondiscrimination requirements in Sections 251(c)(2), (c)(3), and (c)(6) entitle CLECs to obtain physical collocation consistent with the same considerations the ILECs use when planning where to locate their own equipment, *i.e.*, in a cost-effective, efficient location in the ILEC's office. The requesting carrier can be expected to choose what it considers the best possible space in which to collocate its equipment. Providing a competitor with a choice of where to collocate its equipment in the ILEC's office is the only way to ensure that it will receive just, reasonable, and nondiscriminatory collocation space.

Giving CLECs this ability is wholly consonant with Section 251(c)(6) under which an ILEC must continue to provide collocation in its offices until space where it is technically practical to collocate is exhausted.[109] Because Congress severely limited an ILEC's ability to prevent physical collocation, it is clear that Congress was not concerned about differences in the actual space. Why would – or should – Congress be concerned with this if the goal is to open ILEC networks to competition?

Since all space, ultimately, must be available for collocation consistent with the Commission's rules, the Commission must consider whether an ILEC should ever be permitted

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[109] *See* 47 U.S.C. § 251(c)(6).

to object to allowing a CLEC to use space "Z," but not space "A." The Joint Commenters submit that, apart from a clear showing of technical impracticability, the only possible answer is security. But, as discussed above, security is not a consideration under Section 251(c)(6). The Commission should, under no circumstances, accept the ILEC argument that security falls under the "not practical for technical reasons" umbrella. Security is not a technical concern. Moreover, the Commission has already considered the security issue, and has found that there are security measures that can be used such that caged collocation is not necessary. Moreover, the D.C. Circuit agreed that "it is hardly surprising that the FCC opted to prohibit LECs from forcing competitors to build cages, *particularly given the alternative means available to LECs to ensure the security of their premises*."[110] Security is just another red herring the ILECs have thrown out to delay collocation. The Commission should not condone any further attempts to frustrate collocation on these grounds.

The bottom line is that ILECs must provide physical collocation unless technically impractical or space is not available. To ensure that ILECs provide such physical collocation in a manner that comports with the Act, the Commission can either engage in heavy-handed regulation and oversee what collocation space is assigned to CLECs or, it can provide a mechanism where CLECs choose where to physically collocate space. If the task is left to ILECs, they will delay collocation, add costs, and require numerous appeals to already overworked and overburdened state commissions. Even if those state commissions are not overworked and overburdened, the ILECs will still "win," as, at the very least, it will take the state commission time to resolve these disputes. As the ILECs, CLECs, and Commission know,

110 *GTE v. FCC*, 205 F. 3d at 425.

delaying collocation because of regulatory fiat delays competition and the benefits of competition.[111] The Commission can prevent this by providing CLECs with the ability to choose where they want to physically collocate their equipment.

3. REVISING THE COMMISSION'S RULES TO ADDRESS THE COURT'S CONCERNS WHILE PROVIDING COMPETITORS WITH THE ABILITY TO CHOOSE WHERE TO COLLOCATE THEIR EQUIPMENT

In accordance with the foregoing, the Coalition proposes the following procedure for governing the procedure for requesting and obtaining physical collocation in an ILEC office. This procedure meets the requirement that CLECs obtain just, reasonable, and nondiscriminatory collocation while acknowledging the ownership interest of ILECs in the property.

Within five (5) business days of receiving a collocation request, an ILEC must send a written response to the CLEC indicating whether space is available in that central office. Included in each response should be a map of the ILEC's office that the CLEC has requested to be collocated in. The map should show what space is occupied by ILEC and CLEC equipment, as well as any space the ILEC or other CLECs are planning to use within the next six months.[112] The map should also clearly designate unused space that falls within the limitations in Section 251(c)(6).[113] The letter must also include several dates within a ten-business-day period following the letter and times during normal business hours when CLECs can visit the ILEC's office. The CLEC may ask for alternative dates and times for such tours.

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111 *See* Section VI.A, *infra*.

112 It should be noted that section 251(c)(6) does not, on its face, allow reservation of unlimited space. However, to compromise with the ILECs and allow appropriate planning, the Joint Commenters make a proposal regarding the reservation of space in Section VI, *infra*.

113 Section 251(c)(6) requires physical collocation unless "the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations." 47 U.S.C. § 251(c)(6).

Once CLECs receive this information, they should be able to request any unused space available on the ILEC's premises. CLECs must request such space in writing. Once the ILEC receives the CLEC's request for specific space, within ten (10) business days it must either accept the CLEC's request or reject it. If the ILEC rejects the CLEC's request, it must explain why it did so in writing for reasons consistent with the statute and Commission rules as well as offer at least two additional alternative spaces for physical collocation in the same office.

In order to reject a CLEC request, the ILEC must demonstrate to a state commission either (1) why the requested space is "not practical for technical reasons," or (2) that prior to the CLEC request, the ILEC or another carrier reserved the space.[114] In offering alternative physical collocation spaces, the ILEC must certify and demonstrate that the alternative space will (1) not cost materially more than the requested space in terms of installation, maintenance, and any other foreseeable costs; and (2) not take longer to provision than the requested space. If a state commission receives several rejection complaints against an individual ILEC, the Joint Commenters recommend the Commission be required to commence an enforcement action against the ILEC and have the ILEC immediately identify all space that meets the parameters of Section 251(c)(6). The CLECs involved should then be free to choose those remaining spaces without ILEC intervention.

During the time set out by these procedures, the ILEC and CLEC should be able to negotiate the physical collocation space. However, the Commission should make clear that ILECs may not use the process of rejecting CLEC collocation requests for specific space to delay collocation.

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114 *See* Section VI, *infra.*

The above proposal provides ILECs and their competitors with all the protections of the statute. ILECs will be able to limit physical collocation per the limitations found in Section 251(c)(6). Meanwhile, if there is unused space in the ILEC office and there are no technical reasons for why the space cannot accommodate physical collocation, competitors will be able to interconnect and/or obtain access to UNEs at any technically feasible point in the ILEC's network. Providing the CLEC with a lesser role in determining physical collocation space would materially hinder the achievement of the goals behind Sections 251(c)(2), (c)(3), and 251(c)(6), and is not inconsistent with the plain meaning of those provisions. Moreover, the above-proposed mechanism for determining collocation space should reduce costs and limit delays in collocation. It accomplishes these goals by setting out a specific timetable and reducing the number of points on which ILECs and their competitors can disagree.

If a CLEC requests physical collocation without requesting specific space, the ILEC may not offer space that: (1) will be materially more costly than other available space; (2) will take longer to prepare for the requested collocation than other collocation space; and, (3) that is materially inferior to other available space on the basis of sound engineering principles or for other technical or operational reasons. If the ILEC fails to adhere to these requirements it would be violating the just, reasonable, and nondiscrimination requirements found in Sections 251(c)(2), (c)(3), and (c)(6).

C. ALLOWING ILECS TO LIMIT COLLOCATION TO SEPARATE OR ISOLATED SPACE WOULD COMPROMISE THEIR OBLIGATIONS UNDER SECTION 251

Unless there are technical reasons or limitations on space, ILECs should not be allowed to require CLECs to use separate or isolated collocation space. As discussed several

times above,[115] the only statutory limitation on physical collocation that the Commission finds would further the objectives of Sections 251(c)(2) or 251(c)(3) is space availability and practicality for technical reasons.[116] Requiring separate, isolated, walled or caged collocation will not increase space efficiency in ILEC offices. Indeed, walls, separations, and cages will take up additional space resulting in the inefficient use of space.[117] Moreover, walls, separations and cages will not alter the technical practicality of a collocation space. Even the D.C. Circuit found that "nothing in the statute can be read to *require* caged collocation, so the Commission surely was free to promulgate reasonable rules implementing physical collocation under a cageless regime."[118] The only possible concern that the ILECs might have with not requiring isolated or separate collocation area is security. The Commission, however, has already determined that there are other methods for ensuring security.[119] Even the court noted that it was "hardly surprising that the FCC opted to prohibit LECs from forcing competitors to build cages, particularly given the alternative means available to LECs to ensure the security of their premises."[120] Further, unless competitors can choose any technically feasible, unused space in the ILEC's office, there is no way to ensure that the ILECs will not impose unjust, unreasonable, and/or discriminatory obligations on their competitors or segregate space so as to unnecessarily increase ILECs costs and frustrate competition.[121]

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115 *See supra* Section IV., B., 1.

116 *See* 47 U.S.C. § 251(c)(6).

117 *Advanced Services First Report and Order*, 14 FCC Rcd at 4784-85, ¶ 42; *GTE v. FCC*, 205 F. 3d at 425.

118 205 F. 3d at 425.

119 *Advanced Services First Report and Order*, 14 FCC Rcd at 4787-4789 ¶¶ 46-49.

120 205 F. 3d at 425.

121 *See id.*